

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: Case No. 04-16410 (CB-SMB)
KOLLEL MATEH EFRAIM, LLC, New York, New York
Debtor. Tuesday, May 22, 2007
10:50 a.m.
.....

TRANSCRIPT OF MOTIONS
BEFORE THE HONORABLE STUART M. BERNSTEIN
CHIEF UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtor: Scott Krinsky, Esq.
BACKENROTH, FRANKEL &
KRINSKY, LLP
489 Fifth Avenue
New York, New York 10017
(212) 593-1100
For Helen-May Holdings, LLC: David Carlebach, Esq.
LAW OFFICES OF DAVID CARLEBACH
40 Exchange Place
New York, New York 10005
(212) 785-3041
Audio Operator: Electronically Recorded
by Court Personnel
Transcription Company: Rand Transcript Service, Inc.
80 Broad Street, Fifth Floor
New York, New York 10004
(212) 504-2919
www.randtranscript.com

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1 (Proceedings commence at 10:50 a.m.)

2 THE COURT: Okay. Kollel Mateh.

3 MR. CARLEBACH: Good morning, Your Honor.

4 THE COURT: Good morning.

5 MR. CARLEBACH: David Carlebach, representing credit
6 Helen-May Holdings.

7 I guess the first thing we should address is the order
8 to show cause.

9 THE COURT: Okay.

10 MR. CARLEBACH: Debtor, in their response papers, have
11 essentially consented to the prong of the motion seeking a
12 lifting of the stay, which, I guess, is good news in a sense.
13 But what we have put in our reply is that, you know, similar to
14 the rejection of a lease, the Code provides for something
15 called an immediately surrender of the premises to the
16 landlord.

17 I think that in this particular situation, it's
18 analogous to that, and it's just absolutely vital. I mean,
19 it's clear from the advertisement that I appended to -- and I
20 asked the Court to trust my translation, which I will represent
21 is ninety-eight percent accurate.

22 THE COURT: What about the other two?

23 MR. CARLEBACH: In other words, I'm just leaving --
24 I'm leaving a two-percent margin for error, only because
25 somebody --

1 THE COURT: Pretty confident, huh?

2 MR. CARLEBACH: What?

3 THE COURT: That's a lot of confidence.

4 MR. CARLEBACH: Yes. No, I -- and it's clear what the
5 debtors' intention is. The debtors' intention -- they agreed
6 to a lifting of the stay. To now engage in scare tactics in
7 the Orthodox Jewish Community to try to spook any potential
8 buyer, and, most importantly, that they can live in this
9 property rent free over the summer.

10 The problem -- the immediate problem of a potential
11 buyer is that the buyer -- that a potential buyer will force
12 them to leave. And, you know, it's their intention to just
13 keep freeloading. And that's essentially been the long and
14 short of this entire case. And it's just -- in equitable. And
15 I think there's many different ways you can -- as part of the
16 contempt prong that we've asked for, which they have now
17 essentially pleaded poverty --

18 THE COURT: Well, Your Honor, I would have to have a
19 hearing on that. I can't hold somebody in contempt of they
20 say, I can't afford to pay. There are obviously other
21 remedies. But --

22 MR. CARLEBACH: I understand. So even -- I think even
23 without contempt, I think there's enough latitude in the Code,
24 especially based on the immediate surrender provisions of
25 Section 365 by rejection of a lease, which allow you to order

1 an immediate surrender of the premises, I mean, this is really
2 just --

3 THE COURT: And what happens if they don't surrender
4 it? U.S. Marshals have to go up there and take the property?

5 MR. CARLEBACH: That's exactly what we're going to do,
6 Judge.

7 THE COURT: Okay.

8 MR. CARLEBACH: At whatever cost so that we can show
9 the property and do what we need to do. And, you know, if we
10 can get that, I think we've come a long way.

11 In terms of the administrative expense status
12 argument, you know, where --

13 THE COURT: You know, it's unnecessary. You already
14 have an order directing them to make a payment.

15 MR. CARLEBACH: I agree. And, I mean, that's -- I
16 think that's really what's most important today is that the
17 Court enter that type of an order so that we can move forward
18 with this, as opposed to just, you know, going to stage two of
19 delaying our -- my client's rights from being exercised of, you
20 know, for the past three years.

21 THE COURT: Okay.

22 MR. KRINSKY: Your Honor, Scott Krinsky, Backenroth
23 Frankel, for the debtor.

24 The order to show cause says nothing in the papers,
25 the initial papers, about this sort of relief. They just

1 wanted a lifting of the stay.

2 THE COURT: Well, but you're there and you're not
3 paying for it. What's he supposed to do?

4 MR. KRINSKY: He's talking about something completely
5 different. He's talking about a surrender of the property.

6 We consent to the lifting of the stay. We don't
7 consent to a surrender of the property. There's nothing in the
8 initial papers. Your Honor wrote intelligent --

9 THE COURT: They're not asking for your consent to the
10 surrender. He's asking for an order directing you to vacate
11 the property.

12 MR. KRINSKY: Right. But Your Honor wrote intelligent
13 that you can't raise new issues in reply papers. That's
14 basically what they did. Those reply papers were filed last
15 night at twelve o'clock for the very first time.

16 If Your Honor even considers that -- and, also, in
17 your --

18 THE COURT: So should I adjourn this for ten days and
19 then consider it?

20 MR. KRINSKY: Well, Your Honor, in your initial order
21 to show cause, you did not allow for reply papers. So, in
22 essence, there's a Court order which doesn't even consider
23 that.

24 THE COURT: Okay.

25 MR. CARLEBACH: Your Honor, and reply papers are

1 typically not allowed, unless there are new issues raised.
2 And, like I said, this advertisement put in by the debtor is on
3 the very day that the order to show cause was served. On May
4 16th, the day that the debtors' counsel received the order to
5 show cause pursuant to the order, on that very same day, they
6 take out an advertisement in the community saying, don't go out
7 and -- anybody who wants to purchase the property call us,
8 because we're going to lose money.

9 So, clearly, their strategy of consenting to the lift
10 stay, but scaring off the community from -- and where they put
11 into place a mechanism, that's sort of new to us as well, and I
12 think it's appropriate to bring it to the Court's attention
13 under the circumstances.

14 And, you know, every day that goes by is just another
15 day that they're living in this property rent free. And it's
16 just inequitable. It's not something that this Court should
17 countenance.

18 MR. KRINSKY: Your Honor, a couple of things. One, we
19 told them months ago we'd agree to the lifting of the stay. So
20 that's nothing new. It's not in the papers, but just so you
21 know in terms of background.

22 Second thing is that all that advertisement says is
23 that we have an interest in the property, which we legally do
24 have an interest in the property. We don't know how they're
25 marketing the property. They may very well be saying we have

1 no interest in the property.

2 THE COURT: But how can you consent to a lifting of
3 the automatic stay so they can essentially evict you, and still
4 argue that you have an interest in the property? What's the
5 interest?

6 MR. KRINSKY: Our interest is the same. We're
7 basically saying, they want to change the playing field, which
8 is fine. We consent to them changing the playing field.
9 That's --

10 THE COURT: So you're saying they should go to State
11 Court now, and you'll fight them out on the merits?

12 MR. KRINSKY: I don't know if we will or we won't.
13 But, for now, we don't want to bother the Court. We will
14 consent to the lifting of the stay for them to litigate this
15 issue in State Court, which is what we assumed the purpose of
16 the lift-stay motion.

17 Again, the initial papers only say the lifting of the
18 stay. It was assumed by anyone reading that, that that means
19 we will lift the stay to litigate this issue in State Court.

20 THE COURT: That's what lifting the stay normally
21 means.

22 MR. CARLEBACH: I understand, Judge. And I'm asking
23 the -- but, at the same time, as I said, by rejection of a
24 lease in Bankruptcy Court, the Code clearly uses the language,
25 "immediate surrender."

1 THE COURT: But this isn't the rejection of a lease.
2 This is a relief from stay motion.

3 MR. CARLEBACH: I understand.

4 THE COURT: I don't even remember anymore what's the
5 basis of their possession of the property. But, you know,
6 normally, when you make a motion for relief from stay, it's to
7 proceed in another court because you can always proceed in this
8 court without a motion for relief from the stay.

9 And what you're really doing is you're converting this
10 to a motion to convict them.

11 MR. CARLEBACH: Again, Judge, you know, like I said,
12 there are additional prongs to this motion. I know the Court
13 doesn't necessarily want to go into the contempt today. But --

14 THE COURT: Well, there's a factual issue. If you
15 want to proceed with that, I'll schedule a hearing. They're
16 saying they don't have the money to pay it.

17 MR. CARLEBACH: Well, what I'm saying is that --

18 THE COURT: Don't you have a judgment?

19 MR. CARLEBACH: Judgment on what?

20 THE COURT: On the unpaid -- what do you call it? On
21 the unpaid --

22 MR. CARLEBACH: Adequate protection amount?

23 THE COURT: Yeah.

24 MR. CARLEBACH: We don't have a judgment. We just
25 have an order that --

1 THE COURT: I thought I gave you a -- I thought I
2 entered a money judgment.

3 MR. CARLEBACH: No. Well, that's one of the relief
4 we're seeking, Judge, is the entry of a judgment.

5 THE COURT: I thought I did that for the past-due
6 amounts.

7 MR. CARLEBACH: I don't believe so, Your Honor.

8 MR. KRINSKY: Your Honor, you gave us a certain period
9 of time to pay the past-due amounts.

10 MR. CARLEBACH: Yeah. There is another payment coming
11 through -- coming due at the end of this week for an additional
12 205 -- for \$210,000.

13 THE COURT: Who are the other creditors in this case?

14 MR. KRINSKY: Your Honor, off the top of my head, I
15 know there were various other creditors; I think a
16 communications entity, SOS, I don't have the petition in front
17 of me. But there were other creditor claims.

18 MR. CARLEBACH: There are about four or five other
19 creditors, Judge. There was a refrigeration, communications,
20 various trade creditors that apparently put money into the
21 debtor pre-petition in order to --

22 THE COURT: What's going to happen in this case?

23 MR. CARLEBACH: Well, what we'd like to do, Judge, and
24 this goes towards the status conference, the debtor has a --
25 the debtor asked for more time at the last hearing, status

1 conference, I forget which one, to put in a plan. The Court
2 gave them until May 15th. They didn't put in a plan.

3 We would like to put in a plan, Your Honor, Judge,
4 which we will do our -- there are --

5 THE COURT: There's a lot of administrative debt in
6 this case. They ran up a large fee, I'm sure, litigating that
7 Orseck issue.

8 MR. CARLEBACH: Well, Judge, there are -- we also
9 believe we have at least a three-million-dollar administrative
10 claim based on the \$1,500 a day.

11 THE COURT: Okay. But you can deal with your own
12 administrative claim in your plan by deferring it. But you
13 have to pay the administrative claims in full on the effective
14 date in order to confirm, which means, essentially, you're
15 going to have to pay their legal fees, whatever the allowed
16 amount of their legal fees turn out to be. But I'm sure they
17 ran up a lot of money litigating with Orseck. And that wasn't
18 their fault.

19 MR. CARLEBACH: Judge, there may be other avenues of
20 recovery in this case. There are alter-ego theories that we'd
21 like to pursue. And, you know, I think we'd like to give it a
22 shot, certainly.

23 There are other assets in the case.

24 THE COURT: I understand that. But if you file a plan
25 and the plan retains for the debtor, or says that the debtor is

1 going to assert these claims in order to recover money for the
2 creditors, you still have to pay their legal fee on the
3 effective date because that's what it's going to take to
4 confirm a plan. You have to pay all administrative claims, or
5 at least reserve for them on the effective date. And that's
6 the obstacle you may have in proposing a plan.

7 I mean, I think, and I suggested this a couple of
8 months ago, is the case be dismissed and you just pursue them.
9 You're going to have a money judgment, which you can always
10 pursue on an alter-ego theory.

11 The case is -- you know, the case isn't going anywhere
12 in bankruptcy. They're not going to confirm a plan, from what
13 I can tell. And your alternatives are to dismiss the case,
14 convert the case. Obviously, you can file your own plan, but
15 it sounds like it's going to take a lot of money to confirm the
16 case on the effective date.

17 So I think you have to really think about an end game
18 strategy for this case; otherwise, we're just going to kind of
19 bounce along over the next couple of years with these issues
20 that have to be decided.

21 MR. CARLEBACH: Well, one of the issues that are out
22 there, which we've discussed with the Court before, is the
23 motion for summary judgment, which we had wanted that the Court
24 determine that. And one of my purposes --

25 THE COURT: Is that the one with the tax map

1 designation?

2 MR. CARLEBACH: The tax map designation, assignability
3 of the fraud. See, the problem is, Judge, these are --

4 THE COURT: I'll determine that. I'm just -- that's
5 just another issue that's not going to get you where you want
6 to be, anyway.

7 MR. CARLEBACH: Well, in the sense that -- to the
8 extent that they want to go into State Court and play with this
9 thing further, I think it's very important that we have those
10 determinations right here, as opposed to them starting from the
11 ground up in State Court with a new State Court judge, and just
12 raising all these issues and dragging this thing out
13 interminably.

14 So one of the things I wanted to ask for, the Court is
15 -- there was already a motion for summary judgment made, or
16 Local Rule -- there were fifty-six statements were put in.
17 There were, really, I think, three to four issues which were
18 isolated that the Court, on July 20th, 2005, had indicated
19 further briefing. And there was, again, the assignability of
20 the fraud issue was only raised on reply.

21 One of the things I'd like to do today is set down a
22 briefing schedule where we can submit our additional briefs and
23 the Court will essentially deem those briefs as being initial
24 briefs, and curing any deficiency, any pleading deficiency of
25 having had them originally raised --

1 THE COURT: So why don't you just make the motion all
2 over? That's really what you're saying.

3 MR. CARLEBACH: Well, I could do that --

4 THE COURT: You can use what you have, and it's not
5 going to affect the timing of the motion.

6 MR. CARLEBACH: I had thought that the Court had sort
7 of wanted to save us that. But that's fine.

8 THE COURT: Well, what's involved in renewing the
9 motion? It's the same factual material.

10 MR. CARLEBACH: That's fine. That's fine.

11 THE COURT: And you're talking about briefing it. So
12 you can do that.

13 MR. CARLEBACH: We'll make that motion.

14 And I would also like to submit a judgment to the
15 Court on both the adequate protection payment that they've
16 missed for May, and by the end of the week, they're going to be
17 in default on the --

18 THE COURT: Well, okay. Are you going to submit a
19 judgment every month?

20 MR. CARLEBACH: Well, again, on the 13,000 -- well,
21 there's a two-hundred-thousand-dollar payment coming due on May
22 27th, which they've clearly indicated they're not making.

23 MR. KRINSKY: Yeah, but that gets kicked to the 29th,
24 just so you know, Your Honor.

25 THE COURT: All right.

1 MR. CARLEBACH: And -- to the 29th. And I think I'll
2 wait until the 29th comes and goes. If there's a check -- if
3 we get a check in hand, I'll be happy not to submit that,
4 Judge.

5 THE COURT: But don't you have a judgment already? Or
6 you can submit a judgment for a few hundred thousand dollars at
7 this point based on the -- what was ordered on July 20th, 2005.
8 I thought I had --

9 MR. KRINSKY: Right. And you subsequently entered an
10 order on April 25th, which basically gave us -- basically gave
11 us, I think, thirty days to come up with that bigger sum of
12 money.

13 THE COURT: Did it say what happened if you didn't?

14 MR. KRINSKY: It did not.

15 THE COURT: Is there any reason why they shouldn't be
16 able to enter a judgment for that amount?

17 MR. KRINSKY: I think the order in and of itself is
18 sufficient. I don't see any reason to --

19 THE COURT: Well, but they want to file a judgment.
20 It will be a lien on the property to the extent you assert an
21 interest in it and try and sell it. I mean, there are a lot of
22 reasons why they would want to have a judgment to file up in
23 the County.

24 MR. KRINSKY: I'm not sure they don't have -- get to
25 the same place with the order.

1 THE COURT: So you have no objection, since they have
2 it already. Is that what you're saying?

3 MR. KRINSKY: Well, we -- it's speculative and
4 premature at this point. Our time to comply doesn't run until
5 May 29th.

6 THE COURT: All right. Why don't you do this? If
7 they don't pay you, settle a proposed judgment on ten days'
8 notice certifying that they haven't paid. And if you have any
9 objections to the entry of the judgment, we can take care of
10 that.

11 Let me deal with today's motions. The portion of the
12 motion that seeks an administrative claim doesn't really get us
13 anywhere. First of all, there's an existing order which
14 requires them to make a payment every month. It's an adequate
15 protection payment.

16 In addition, if it were purely an administrative
17 claim, I'd say, well, they'll pay you at the time of the
18 confirmation. So I'm going to deny that motion. Really, you
19 have that relief already in the form of an adequate protection
20 payment.

21 With respect to the contempt, if you want to pursue
22 that, I'll have to schedule a hearing because they're saying
23 they're unable to pay. But I'll give you a chance to think
24 about that and discuss it with your clients.

25 MR. CARLEBACH: Okay.

1 THE COURT: With respect to the relief from stay
2 motion, I'll grant the relief to stay on consent, but Mr.
3 Krinsky is right. Your order didn't -- your motion didn't
4 request that I direct them to vacate the property. And I'm not
5 so sure that that's an appropriate relief in the context of a
6 relief-from-stay motion. Generally, a relief-from-stay motion
7 sends the parties back to their remedies in another court. As
8 I said, if you think there's a basis under bankruptcy law to
9 cause them to vacate the property, you don't have to make a
10 relief-from-stay motion. You just bring a proceeding to
11 require them to vacate the property. I don't know if there is
12 such a basis to do that.

13 With respect to the summary judgment motion, it
14 probably makes sense to renew it at this point. You want to
15 add additional briefing, anyway, so you can just do it all at
16 one time.

17 My recollection is that, I think it's Fox v.
18 Rothschild is the Appellate Division case --

19 MR. KRINSKY: Well, again, Your Honor, those are
20 issues --

21 THE COURT: -- and then there's a Second Circuit case
22 which cites it with approval which has a French title, Bank
23 something or other, which basically says that in the absence of
24 some explicit agreement, the fraud claim doesn't go to the
25 transferee. But, you know, if you want to brief that issue, go

1 ahead.

2 MR. CARLEBACH: Okay.

3 THE COURT: All right? So you can -- what do you want
4 to do with your contempt? Do you want to think about it?

5 MR. CARLEBACH: I want to think about the contempt,
6 yes.

7 THE COURT: All right. If you want to put that on for
8 a hearing, let chambers know and we'll have a telephonic
9 conference to schedule a hearing on that.

10 You can settle an order granting relief from the
11 automatic stay denying the motion with respect to the
12 administrative claim for the reasons stated on the record, and
13 just make your motion for summary judgment. Make it promptly,
14 because I think this case is on a short string.

15 MR. KRINSKY: Your Honor, are we getting to a briefing
16 schedule on summary judgment today, or is that a --

17 MR. CARLEBACH: Well, I'll make the motion, and --

18 THE COURT: Why don't you discuss it? I think most of
19 this is briefed.

20 MR. KRINSKY: I would not necessarily agree with that,
21 Your Honor.

22 THE COURT: Okay. And, as I said, you've got to think
23 about, you know, where you're going with this case.

24 MR. CARLEBACH: Okay. And if there is -- I would like
25 to look at the issue of if there is a basis under the

1 Bankruptcy Code for Your Honor to order an immediate surrender,
2 I'd like to renew that.

3 THE COURT: You can always renew that.

4 MR. CARLEBACH: Yeah. Okay.

5 THE COURT: I just don't think that the relief-from-
6 stay motion does that.

7 MR. CARLEBACH: Okay.

8 THE COURT: Okay?

9 MR. CARLEBACH: Thank you.

10 MR. KRINSKY: Your Honor, thank you for your time.

11 THE COURT: Thanks. Let me give you another date for
12 the status conference. I'm sure I'll see you before then, but
13 how about June 26th?

14 MR. CARLEBACH: I think I have an argument in the
15 Second Circuit on the 26th.

16 THE COURT: Why don't you do this? Are you going to
17 make your motion soon?

18 MR. CARLEBACH: Yes.

19 THE COURT: All right. Why don't -- whatever return
20 date you select for the motion, ask my deputy to adjourn the
21 status conference to that date also.

22 MR. CARLEBACH: Okay.

23 THE COURT: Okay?

24 MR. KRINSKY: Your Honor, thank you.

25 THE COURT: Okay, thanks.

(Proceedings concluded at 11:08 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings in the
above-entitled matter to the best of my knowledge and ability.



June 19, 2007

Cathryn Lynch, NJ CERT 565
Certified Court Transcriptionist
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